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No. 83-3.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

SUSANNA BAGINSKY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petitioner's Reply to Memorandum for the United States
in Opposition to Petition for a Writ of Certiorari
to the United States Court of Appeals for the
Federal Circuit.

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Table of Authorities Cited.

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In her petition for a writ of certiorari, Dr. Susanna Baginsky claims that the United States Court of Appeals for the Federal Circuit erred in setting aside the trial court's finding that her

1975 termination was causally linked to the complete failure to counsel her with respect to the April 1974 proficiency report. Petitioner also argues that the court of appeals erred in making its own fact findings on issues as to which the trial court had made no findings and had not fully developed a record.

The United States seeks to justify this invasion of the trial court's fact finding role on two bases: first, the trial court committed legal error and hence its findings are entitled to no deference. Second, no purpose would be served by remand to the trial court for further fact findings since only one result was possible. Neither assertion excuses the failure of the court of appeals to adhere to this Court's teachings in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), and other cases.

The government contends that the trial court's finding of "causation" is entitled to no deference since "its analysis assumed that the Court of Claims had already held that any violations regarding the 1974 proficiency report undermined the VA's discharge of petitioner." Memorandum in Opposition at 4. This argument suggest that the trial court's finding was based upon an isolated or technical violation. To the contrary, the trial court found that the Veterans Administration failed to follow its regulations "in any material respect" (A. 49a). There is no suggestion by the court of appeals that this finding is erroneous; nor does the government so contend. Given the correctness of that finding, it was incumbent upon the court of appeals, once it decided that the trial court should have addressed the post-April 1974 events, to remand to the trial court to determine whether those events somehow removed the taint of the wholesale violations of Veterans Administration regulations.

The court of appeals dismissed the prior finding of the three judge panel of the Court of Claims that there was a "sufficient relationship" between the failure to counsel and the termination to sustain petitioner's claim, stating that the earlier review was based upon an incomplete record. Similarly, the court of

appeals dismissed the finding of the trial court that there was a causal relationship between the 1974 failure-to-counsel and the 1975 discharge because it felt the trial court misinterpreted the remand from the first review by the three judge panel of the Court of Claims. The trial court focused upon whether Dr. Baginsky had been shown the April 1974 report or had been counseled with respect to it. The court of appeals stated that the trial court should have reviewed the entire time period, through the 1975 termination.

Instead of remanding, the court of appeals set aside the finding of the trial court that there was a causal link between the failure to counsel and the termination and made its own findings. That action ignored important findings of the trial court which are not clearly erroneous. The trial court, having found that the Veterans Administration failed to adhere to its regulations in any respect, went on to find facts which buttressed the earlier ruling of the three judge panel of the Court of Claims that petitioner's 1975 termination was tainted by the procedural deficiencies in connection with the 1974 proficiency report (A. 81a). The trial court found that most of the reasons raised by the Veterans Administration in connection with the termination stemmed from incidents covered in the April 1974 proficiency report about which Dr. Baginsky was not informed or counseled. The "Proposed Separation," submitted by the hospital's director to the Veterans Administration central office in November 1974 (seven months after the defective report), largely tracked the April 1974 complaints (A. 68a). (In its Memorandum in Opposition at 2, the government refers to this Proposed Separation as a "second report," apparently suggesting it was another proficiency report. That is erroneous. The proposed separation was the first step taken by Dr. Baginsky's superiors to initiate her discharge.) These findings strongly suggest that had there been a remand from the court

of appeals to the trial court, it would have found for the petitioner.

The United States contends, Memorandum in Opposition at 5, that remand is unnecessary where the record permits only one resolution of the factual issue. It furthermore suggests that this Court should not concern itself with such a "fact-bound determination." *Id.* Again, the government is incorrect. This is not a situation in which the trial court had made fact findings on all issues in the case, such that the court of appeals could reach its own conclusion. The trial court did not address the post-April 1974 events, except to the extent they bore a relation to the April 1974 proficiency report. Indeed, the trial court considered the post-April 1974 events "not directly relevant to the issue here on remand" (A. 68a).

Instead of remanding, the court of appeals examined the record on its own. It found two instances after April 1974 which it considered to be counseling. The trial court had made no finding as to the nature of those two conversations, since the parties at trial did not fully address the issue of the post-April 1974 events (A. 22a). If the case is remanded under the appropriate legal standard, petitioner will prove that those two "instances" were in no way counseling sessions. That issue was never resolved by the trial court, which is in the best position to resolve such factual issues. Instead the court of appeals resolved the factual issue as to whether there were counseling sessions.

Based upon these two conversations, as to which the trial court made no findings, the court of appeals implicitly reversed the prior finding of causation. Such a course is improper where the trial court made no findings on whether the post-April 1974 events attenuated the procedural irregularities. The "fact finding" by the court of appeals does not answer the question whether the failure of the Veterans Administration to follow its own regulations led to her termina-

tion. If the regulatory violations did lead to her firing, then the "fact" of two counseling sessions cannot remedy the situation. The question which should have been answered, but was not, is whether the wholesale regulatory violations tainted the dismissal. That is a question which the first decision by the three judge panel of the Court of Claims recognized, even though it also recognized that the 1975 termination was apparently conducted in compliance with applicable regulations (A. 81a). The trial court answered the question but was reversed for not considering the post-April 1974 events. The court of appeals addressed the post-April events as if it were the trier of fact, but then did not address the question of whether the 1974 regulatory violations tainted the termination. Petitioner is entitled to a ruling, by the trial court in the first instance, on that question. While it may have been proper for the former Court of Claims to have made such findings in the first instance, a court of appeals cannot do so.

The causation issue is *not* a question which is capable of answering in only one way. The trial court's findings suggest that on remand it would have found for Dr. Baginsky, since the reasons proffered for her termination stem in large part from events prior to April 1974. This Court has recognized the unique ability of trial courts to resolve issues such as causation and intent. *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960). Indeed, in similar circumstances, the court in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), squarely held that a district court's finding as to intentional race discrimination can only be reversed if clear error is shown.

The government's final contention, that the Court should not review this matter in its "present interlocutory posture," Memorandum in Opposition at 5 n.3, is without merit. Pursuant to the direction of the court of appeals, the Claims Court entered final judgment in this case on October 8, 1982 (A. 85a-86a). The appeal to the Federal Circuit was from that

judgment. In no sense then is this case in an interlocutory posture. Unless this Court reviews the ruling of the court of appeals on count one now, plaintiff's rights will be lost.

Respectfully submitted,

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